No. 14949

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM H. MARTIN, doing business as MARTIN'S AUTO TRIMMING, INC., on behalf of itself and others similarly situated,

Appellant,

vs.

T. C. COLEMAN ANDREWS, as the duly appointed and acting Collector of the Internal Revenue Service of the United States, and ROBERT A. RIDDELL, as Director of the Internal Revenue Service for the Southern District of California,

Appellees.

Appeal From the United States District Court for the Southern District of California, Central Division.

BRIEF OF APPELLANT.

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Statement of the Case.

This is an appeal from a judgment and order dismissing plaintiff's complaint and denying plaintiff's application to restrain the assessment or collection of excise taxes.

Defendant Robert A. Riddell as Director of Internal Revenue moved to dismiss plaintiff's action on the following grounds:

1. For lack of jurisdiction over the subject matter;

2. For failure to state a claim upon which relief can be granted and for the reason that its maintenance is prohibited by Section 7421(a) of the Internal Revenue Code for 1954, Section 3653(a).

A judgment and order was made dismissing the action.

It is from this judgment and order that this appeal is taken.

Statement of Pleadings.

Plaintiff's First Amended Complaint consists of six Causes of Action. In the first cause of action plaintiff alleges that the plaintiffs were engaged in the business of operating auto upholstery shops. That the Collector of Internal Revenue had notified the plaintiffs that they were liable for an excise tax of 8% of the gross amount of all sales of automobile seat covers between the years 1932 to August 18, 1952.

That the Collector is threatening to assess and collect a tax from the plaintiffs.

That none of the plaintiffs have collected any excise tax from their customers for the period mentioned. That many of the plaintiffs as a result of their failure to have collected any excise tax from their customers are now without sufficient funds of their own to pay these taxes. That many of the plaintiffs would actually be forced to close down and liquidate their business if the Collector insists upon payment of the tax, inasmuch as they do not have the funds to pay such a tax.

The equity jurisprudence of the court is invoked to prevent a multiplicity of suits by such of the shop owners who may, under threat of levy and seizure, borrow the money to pay the tax; that if these plaintiffs are required

to pay the tax and are compelled to resort to a court of law to recover the amount so paid, the business of the court will be obstructed by the number of the same cases.

That between 1932 until August 18, 1952, the Collector, through his duly authorized officials acting within the scope and course of their employment, did make and issue a number of opinions both orally and in writing to various of the plaintiffs uniformly holding and stating that no excise tax attaches to any auto seat covers made by the plaintiffs if made by individual measurement and not by pattern.

That the plaintiffs in good faith relied upon these opinions, and did not include in any sales made by them any excise tax prior to August 18, 1952.

On August 18, 1952, the Collector for the first time since the enactment of the Revenue Act of 1932, did publish a notice stating that all sales of seat covers whether made by pattern or individual measurement would henceforth be taxable.

That the Collector is now seeking to impose upon the plaintiffs payment of an excise tax for all seat covers made and sold by them on individually measured jobs made to new or used car dealers prior to August 18, 1952.

Plaintiffs allege that by reason of the opinions issued by the defendants' officials, the collector is estopped to assess a tax against the plaintiffs for any seat covers manufactured and sold by them prior to August 18, 1952, when such seat covers were made to individual design and not by pattern and were immediately installed and not taken from stock.

That the amount in controversy exceeds the sum of $3,000.00 and that unless injunctive relief is granted it is

alleged plaintiffs will suffer irreparable injury and damage. [Tr. p. 88.]

In plaintiff's Second Cause of Action it is alleged that plaintiffs are not manufacturers but are automobile upholsterers. That the defendants have issued a regulation that sales on seat covers for individuals prior to August 18, 1952, are exempt but that sales for new or used car dealers prior to August 18, 1952, are not exempt even though made to individual design and measurement.

That the regulation is arbitrary and confiscatory and constitutes a denial of the equal protection of the law as provided for by the Fourteenth Amendment by exempting the tax on sales to retail customers when the retailer personally contracts for the purchase of the seat covers, but applying the tax on such sales if the sale is arranged by or made through a new or used car dealer and likewise applying the tax on used cars owned by the dealer and not ordered for resale. [Tr. p. 96.]

Plaintiff's Third Cause of Action alleges that plaintiffs were not manufacturers but are automobile upholsterers in the same category as a custom made-to-order tailor shop. That the transactions involve the sale of labor and material and not the sale of an accessory. [Tr. p. 104.]

Plaintiff's Fourth Cause of Action alleges that the Collector heretofore issued a regulation—S. T. 928—holding that glass cut to automobile pattern pursuant to a customer's order if installed by the person who cuts such glass, is deemed to be a sale of labor and material and not the sale of an automobile accessory.

That the determination that automobile seat covers made by individual measurement and installed by the person who makes the same are subject to an excise tax and

is not one involving the sale of labor and material as was determined by Regulation 46 S. T. 928 when applied to glass for automobiles is discriminatory and arbitrary and is a denial to the plaintiffs of the equal protection of the laws in that it discriminates against the plaintiffs on the identical method of operation in favor of shop owners engaged in the business of selling and installing glass on automobiles for retail customers and for new and used car dealers. [Tr. p. 105.]

Plaintiff's Fifth Cause of Action alleges that defendant has issued a notice that if a manufacturer makes seat covers, whether by pattern or individual measurement, and whether made for the consumer or new or used car dealers, all such sales would henceforth be taxable.

That plaintiffs are not manufacturers but are automobile upholsterers. That the transactions in which these plaintiffs are engaged involve the sale of labor and material and not the sale of an accessory.

That in order to prevent the imposition of penalties and subject themselves to prosecution, the plaintiffs have since August 18, 1952, paid over to the Collector an excise tax of 8 per cent of the selling price for all custom made to order seat covers sold by them.

That the suit is brought on behalf of 185 upholstery shop owners similarly situated as plaintiff. That the plaintiffs will suffer irreparable damage unless given relief by the court against the enforcement of the tax. Thousands of transactions are affected each day upon which defendants claim payment of a tax. Plaintiffs invoke the equity jurisprudence of the Court to prevent a multiplicity of suits. [Tr. p. 106.]

In Plaintiffs' Sixth Cause of Action it is alleged that a regulation was made by the defendants that glass cut to pattern if immediately installed by the person who cuts such glass, is not subject to excise tax for the reason that the sale is deemed to be one involving the sale of labor and material and not the sale of an accessory.

That a determination that automobile seat covers made by individual pattern and design is subject to excise tax and is not the sale of labor and material, as was determined by S. T. 928 when applied to glass for automobiles is discriminatory and arbitrary and a denial to plaintiffs of the equal protection of the laws afforded by the Fourteenth Amendment in that it discriminates against plaintiffs on the identical method of operation in favor of shop owners engaged in the business of selling and installing glass on automobiles for retail customers and for new and used car dealers.

Plaintiffs asked that defendant be restrained from the collection of any excise tax levied or assessed by the defendant against the plaintiffs or any of them either prior or subsequent to August 18, 1952, on custom made to order seat covers sold to new and used car dealers or the direct consumer. [Tr. p. 109.]

In support of the application for a temporary restraining order plaintiffs filed the following affidavits:

Affidavit of Richard Lambeth alleging there had been served upon him a notice of a proposed tax assessment in the sum of $2,003.04 for custom made seat covers made by him prior to August 18, 1952. His affidavit alleged that he does not have the funds to pay the tax and that if the defendants would enforce payment such enforcement would destroy his business. That he is not

a manufacturer, but that all seat covers made by him were individually made on a custom made to order basis. [Tr. p. 113.]

Affidavit of Eugene L. Lessner alleging there had been served upon him a notice of a proposed tax in the sum of $3,685.51 for custom made to order seat covers made by him prior to August 18, 1952. That he did not collect any portion of the excise tax, that he does not have the funds to pay these taxes and that if defendant would enforce payment of this tax, such enforcement would destroy his business.

That he is not a manufacturer but that all seat covers were individually made on a custom made to order basis. [Tr. p. 73.]

Affidavit of Junius W. Martin that there was served upon him a notice of a proposed tax assessment in the sum of $2,700.00 for custom made-to-order seat covers made by him for new and used car dealers prior to August 18, 1952. That he did not collect any portion of the excise tax; that he does not have the funds to pay; that he is not a manufacturer; that all seat covers were individually made and installed on the cars for which they were made. That if defendants would enforce payment such enforcement would destroy his business. [Tr. p. 87.]

Affidavit of William H. Martin that in 1936 he visited the office of the Internal Revenue Service in Los Angeles and was informed by an official in charge of the Excise Tax Division that an excise tax was only applicable to ready made seat covers if cut by patterns and carried in stock as a finished product; that there was no excise tax applicable to any seat covers made to individual measurement and immediately installed.

That in 1945 a Mr. Herbert G. Barnett an official in the employ of the Los Angeles Bureau of Internal Revenue made a similar statement to him.

That in September, 1952, he received a notice from the Bureau of Internal Revenue stating that commencing August 18, 1952, all sales of seat covers would be taxable regardless as to whether they were installed by the manufacturer or by other persons.

That plaintiff was not operating as a manufacturer; that each seat cover was made by individual design and not by pattern and was immediately tailored to the upholstery.

That for 20 years the defendants interpreted the regulations to require payment of a tax only on seat covers manufactured and placed on the shelves for stock and that seat covers made to order and installed immediately were not subject to tax.

That on October 14, 1947, a letter was directed to Blackwood Auto Seat Covers one of the plaintiffs on the official stationery of the Treasury Department stating that no tax applies on made to order seat covers.

That in 1948 an agent in charge of the Los Angeles office of the Internal Revenue Service made similar representations to one Rubie Gilbert, an accountant.

That in February, 1950, one Louis Lampert was informed by the head of the Excise Tax Office in the Los Angeles Internal Revenue Bureau that they had received word from Washington that no tax was to be collected on custom made to order seat covers whether the customer be a new or used car dealer or a retail customer.

That the plaintiffs relied in good faith upon the opinions and statements made and issued by the agents of the defendants and their predecessors and did not include in their selling price an excise tax for any seat covers made and installed by them prior to August 18, 1952.

That Section 379(b) of the Internal Revenue Code prohibits retroactive regulations. That the notice issued by Defendant's Exhibit "E" entitled modification by the Bureau of Internal Revenue relative to custom made seat covers dated August 18, 1952, that excise tax is to apply to sales made to new or used car dealers prior to August 18, 1952, is an attempt to repudiate the many opinions made by defendant's agents wherein these plaintiffs were led to believe there was no tax applicable on such sales.

That plaintiff William H. Martin has been handed a proposed assessment in the sum of $11,917.73 for the period 1950 to August 18, 1952, likewise. That other plaintiffs have received notices of proposed taxes for the period prior to August 18, 1952. That plaintiffs cannot now legally enforce payment from their customers of the excise tax now sought to be enforced against them. That in order for plaintiff Martin to pay the tax he would actually be forced to mortgage his home.

That defendants have notified Richard Lambeth and M. Pelter that they are to be assessed a tax in the sum of $2,003.14, and that if they are required to pay the tax they would be forced to liquidate their business as they do not have the money to pay the tax.

That the plaintiff Eugene L. Lessner is financially unable to pay this tax and it would cause him great financial hardship if he is forced to pay it.

That the defendants have misled the plaintiffs so that plaintiffs did not include in their selling price the excise tax on any sales which they made on custom made to order seat covers or retail customers prior to August 18, 1952.

That on February 25, 1944, one H. G. Barnett, Acting Chief of the Miscellaneous Tax Division of the Department of Internal Revenue addressed a letter to E. W. Cheadle, one of the plaintiffs, wherein Mr. Barnett stated that under the ruling of the Commissioner of Department of Internal Revenue all seat covers made from new material for immediate installation were not subject to an excise tax. That neither the plaintiff nor any of the plaintiffs ever knew that there was an excise tax to be charged, that all information they had received from defendants was that there was no excise tax to be charged.

That the imposition and enforcement of such a tax of the defendants against any of the plaintiffs would be an act of oppression and injustice and would cause plaintiffs great financial hardship and distress.

Plaintiffs asked that the defendants be estopped from assessing an excise tax against the plaintiffs or any of them for any custom made automobile seat covers made prior to August 18, 1952, for new or used car dealers. [Tr. p. 25.]

Affidavit of Kenneth Sorenson stating there had been served upon him a notice of proposed assessment for excise taxes for custom made to order seat covers in the sum of $1,789.51 for seat covers sold to new and used car dealers prior to August 18, 1952. That he did not collect the tax; that he does not have the funds to pay these taxes; that he had been led to believe there was

no excise tax chargeable on custom made to order seat covers, whether made for dealers or retail customers. That he is not a manufacturer. That if defendant would enforce payment of this tax such enforcement would destroy his business unless he was successful in borrowing money to pay this tax. [Tr. p. 75.]

Defendants made a motion to dismiss (1) for lack of jurisdiction over the subject matter and (2) for failing to state a claim upon which relief can be granted on the ground its maintenance is prohibited by Section 7421(a) of the Internal Revenue Code.

The Court made an order granting the Motion to dismiss on the ground that plaintiff's action is prohibited by Section 7421 of Title 26 U. S. Code and that the court found no exceptional circumstances alleged in plaintiff's complaint which would bring the cause of action within the exceptions to the rule, particularly so because plaintiffs had not exhausted the administrative remedies provided by the Internal Revenue Regulations. [Tr. p. 128.]

Findings of fact were made by the court in part as follows:

That plaintiff was entitled to full administrative hearings prior to the assessment of the tax. That after assessment of the tax and prior to payment thereof, or collection thereof, plaintiff could file a claim for abatement which filing would defer the collection of the tax until it had been disposed of. That plaintiff failed to exhaust its administrative remedies. That there were no exceptional circumstances alleged by the pleadings or affidavits which would bring the causes of action within the exceptions to the rule prohibiting injunctions against the assessment and collection of federal taxes. That plain-

tiffs may pay one or more of the proposed assessments, file a claim for refund, and in the event of its denial by rejection or inaction, sue the government and thus secure an adjudication on the merits.

From the foregoing facts the court concluded:

That the action was prohibited by Section 7421 of the Internal Revenue Code;

That there are no exceptional circumstances which would except the case;

That plaintiffs would not suffer irreparable injury and are not in such exceptional circumstances so as to render inadequate their remedies at law. Mere difficulty in raising money to pay the taxes or having to borrow the money is not enough;

That plaintiffs had failed to exhaust administrative remedies available to them;

That the relief sought is in the nature of declaratory relief with respect to federal taxes and is barred by Title 28, U. S. Code, Section 2201;

That defendants are entitled to an order denying motion for preliminary injunction;

That plaintiffs have an adequate remedy at law and are not entitled to equitable relief or an injunction;

That whether this is a proper class action is immaterial to the decision denying a preliminary injunction. [Tr. p. 134.]

Judgment was made and entered dismissing the action with prejudice as to each defendant. [Tr. p. 136.]

An order was made and entered denying the preliminary injunction. [Tr. p. 138.]

Summary of Argument.

An action may be maintained to restrain the assessment or collection of excise taxes notwithstanding the positive prohibition of Section 3653 of the Internal Revenue Code.

Such an action will lie as follows:

1. When there exists special and extraordinary circumstances;

2. Where the taxing agent does not have jurisdiction to levy the tax as distinguished from errors or irregularity or other defects which are not jurisdictional;

3. Where a class action is brought or one to avoid a multiplicity of law suits.

In the instant case the defendant taxing agent never acquired jurisdiction over the plaintiff to assess against them an excise tax on custom made to order seat covers. This is sharply demonstrated by the fact that for over 20 years the men whose responsibility it was to enforce the tax not only failed to assess such a tax but throughout this period by letters and oral statements led the plaintiffs to believe that the only excise tax that was applicable was the tax on seat covers manufactured by pattern and placed on the shelves to be sold out of stock as a ready made seat cover.

The distinction now sought to be made by the tax collector that a tax would not apply retroactively to seat covers made for retail customers directly but would apply if made for new or used car dealers, was arrived at by the application of fundamentally unsound principles and violates due process of law (erroneously alleged as a violation of the Fourteenth Amendment).

The sale of custom made to order seat covers by an automobile upholsterer, is a sale of labor and materials. The excise tax in question is a manufacturer's tax and no one of the plaintiffs are manufacturers.

Appellant has adequately alleged the special and extraordinary circumstances so as to entitle plaintiffs to a trial on the merits, and to the temporary injunction prayed for.

Plaintiffs allege that the enforcement of the retroactive tax would force many of the plaintiffs to close down and liquidate their businesses as they do not have the funds to pay such a tax at this time. [Par. IX of Amended Complaint.]

Extraordinary circumstances (estoppel) are also sufficiently alleged arising from the many statements made by defendants' agents which have lulled plaintiffs into believing that there was no tax applicable, that they relied upon these statements and that they did not therefore collect any such taxes.

ARGUMENT.

The District Court determined that it lacked jurisdiction to grant the injunctive relief prayed for on the following grounds:

1. That plaintiff's last five causes of action were an effort to plead a cause of action under the Declaratory Relief Act and is prohibited by the exception therein with respect to controversies as to Federal taxes.

2. That the first cause of action is likewise prohibited by said section as well as by Section 7421 of Title 26, United States Code, the Internal Revenue Code of 1954.

3. That plaintitff failed to exhaust the Administrative remedies provided by the Internal Revenue regulations.

4. That plaintiffs have an adequate remedy at law to pay the tax and sue for refund.

I.

The District Court Erred in Determining That It Lacked Jurisdiction Over the Subject Matter Alleged in the First Amended Complaint, That the Causes of Action Failed to State a Claim for Relief and Were Prohibited by Section 7421, Internal Revenue Code.

A declaratory judgment may be entered or an injunction issued where there are extraordinary circumstances presenting unusual hardship.

There are exceptions to the broad exception in the Federal Declaratory Judgment Act. It has been said that the language which excepts federal taxes from the

Federal Declaratory Judgment Act is co-extensive with that which precludes the maintenance of a suit for the purpose of restraining the assessment or collection of a tax under Section 3653 of the Internal Revenue Code.

Tomlinson v. Smith, 128 F. 2d 808.

II.

An Assessment or Collection of a Tax May Be Restrained by Injunction Notwithstanding the Statutory Prohibition of Section 3653 of the Internal Revenue Code. (Formerly R. S. 3224.)

In the case of *Allen v. Regents,* 304 U. S. 439-448, the United States Supreme Court held that an action would lie enjoining the Collector of Internal Revenue from assessing a tax notwithstanding the provisions of Section 3224 of the Internal Revenue Code. The Supreme Court said that Section 3224 is inapplicable in exceptional cases where there is no plain, adequate and complete remedy at law.

The question presented in this case was whether the exaction of a Federal admissions tax in respect of athletic contests in which teams representing colleges unconstitutionally burdens a governmental function of the State of Georgia, to wit: The State University. The United States Collector of Internal Revenue challenged the ability of the University to maintain a suit to enjoin the application of the tax. The court below decided against the Collector and the United States Supreme Court granted certiorari. The Revenue Act of 1926 imposed a tax of 1¢ for each 10¢ admission to any place. The University contended that it was not liable for the admission tax and deposited the amount collected in a separate bank account but made no return thereof. In

consequence of the University's neglect to pay the amounts, the Commissioner assessed the University and made a demand for payment. The Collector filed a lien and levied upon the deposit account. The University sought an injunction to restrain the Collector from proceeding further to collect the sums demanded. The lower court awarded a final injunction and the Collector appealed. The Circuit Court of Appeals confirmed the decree.

The United States Supreme Court, in ruling that the court below rightfully decided the procedural questions, to wit: the right to seek an injunction, but held the court erred as to the merits. The Collector contended that R. S. 3224 prohibits the issue of an injunction against collection. (U. S. C. Title 26, Sec. 1543.) The University contended that State officials may not be required to collect an illegal tax as a condition precedent to contesting its validity, and that Section 3224 is not applicable to this suit. The United States Supreme Court said:

> "The dispute as to the propriety of a suit in equity must be resolved in the light of the nature of the controversy. The respondent in good faith believes that an unconstitutional burden is laid directly upon its transactions in the sale of licenses to witness athletic exhibitions conducted under authority of the State and for an essential governmental purpose. The State is entitled to have a determination of the question whether such burden is imposed by the statute as construed and applied. It is not bound to subject its public officers and their subordinates to pains and penalties criminal and civil in order to have this question settled, if no part of the sum collected was a tax, and if the assessment was in truth the imposition of a penalty for failure to exact a tax on behalf of the United States. And if the respon-

dent is right that the statute is invalid as applied to its exhibitions, it ought not to have to incur the expense and burden of collection, return, and prosecution of claim for refund of a tax upon others which the State may not lawfully be required to collect. These extraordinary circumstances we think justify resort to equity.

What we have said indicates that R. S. 3224, *supra,* does not oust the jurisdiction. The statute is inapplicable in exceptional cases where there is no plain, adequate and complete remedy at law. This is such a case, for here the assessment is not of a tax payable by respondent but of a penalty for failure to collect it from another. The argument that no remedy need be afforded the respondent is bottomed on the assumption that it is a mere collecting agent which cannot be hurt by collecting and paying over the tax; but this argument assumes first, that respondent did in truth collect a tax and, second, that the imposition of the tax on the purchase of admissions cannot burden a state activity. This is arguing in a circle, for these are the substantial matters in controversy. We hold that the bill states a case in equity as, upon the showing made, the respondent was unable by any other proceeding adequately to raise the issue of the unconstitutionality of the Government's effort to enforce payment."

Hirst v. Gentsch, 133 F. 2d 247. In that case plaintiff alleged that the taxes which the Collector had sought from it were assessed wholly with respect to certain distributions from partnership earnings; that the partnership was not subject to such taxes; that the partnership is unable to pay such tax penalties and interest without liquidating its property and that if the Collector, whose

duty it is to collect them, proceeds to do so by distraint or levy, the plaintiff will be forced into complete cessation of its mining operations and its business will be ruined. It alleges therefore that it has no adequate remedy at law. The Circuit Court of Appeals said:

> "The single question presented upon the appeal relates to the jurisdiction of the court to restrain collection of taxes assessed against the appellant under the Federal Insurance Contributions Act (Internal Revenue Code, Chapt. 9, sub-Chapt. A, Section 1400 *et seq.*, approved February 10, 1939, 53 Stat. 175, 26 U. S. C. A. Int. Rev. Code, Section 1400 *et seq.*), and the Federal Unemployment Tax Act (Internal Revenue Code, Chapt. 9, sub-Chapt. C, Section 1600 *et seq.*, 53 Stat. 183, 26 U. S. C. A. Int. Rev. Code, Section 1600 *et seq.*). The District Court dismissed the bill on the ground that it lacked jurisdiction in view of Section 3653 of Title 26 U. S. C. A. Int. Rev. Code, and also upon the ground that the complaint sets forth no facts which, if true, would entitle plaintiff to the relief prayed for.
>
> Section 3653 of the Internal Revenue Code was formerly Section 3224 of the Revised Statutes, and provides: 'Except as provided in sections 272(a), 871(a), and 1012(a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.'
>
> It has been construed in a long line of cases to withdraw from the courts the power to restrain assessment or collection of taxes where the challenge is to the validity or applicability of the tax. Its restraint is not, however, absolute, and beginning with Dodge v. Brady, 240 U. S. 122, 126, 36 S. Ct. 277, 60 L. Ed. 560, through Hill v. Wallace, 259 U. S. 44, 42 S. Ct. 453, 66 L. Ed. 822, and Miller

v. Standard Nut Margarine Co., 284 U. S. 498, 509, 52 S. Ct. 260, 76 L. Ed. 422, an exception to the universality of its application has been recognized in cases which, though apparently within its terms, present extraordinary and entirely exceptional circumstances to make its provisions inapplicable. The latest case to sustain the jurisdiction of the court to take cognizance of a suit for injunction, is Allen, Collector v. Regents of the University, 304 U. S. 439, 448, 58 S. Ct. 980, 82 L. Ed. 1448. It must be observed, however, that the later decisions were not reached without vigorous protest by members of the present court, including the Chief Justice.

The circumstances that are to be considered extraordinary or exceptional have never, of course, been catalogued. In Miller v. Standard Nut Margarine Co., *supra,* however, the fact that the collection of a tax would prove to be arbitrary and oppressive, destroy the business of the taxpayer, ruin it financially, and inflict loss for which it would have no remedy at law, was held to indicate circumstances so extraordinary and exceptional as to give jurisdictional sanction to an application for injunction restraining the collection of the tax. Recently, under substantially identical circumstances in Midwest Haulers, Inc. v. Brady, Acting Collector, 6 Cir., 128 F. 2d 496, we reversed a judgment declining jurisdiction of a petition for injunction. We there pointed to the genesis of Section 3653 and traced the development of the principle underlying the exceptions to its application. This discussion need not be repeated. The present case requires the application of the same principle as governed that adjudication and must be similarly decided.

The complaint below having been dismissed upon motion, its allegations must be taken as true, and

so considered they show that the taxes sought to be collected from the appellant are probably not validly assessed taxes, and if collection is enforced by distraint the appellant will be ruined in its business and forced to close its mine. In that event no remedy provided by the Internal Revenue Law would be adequate to compensate the appellant for its loss. There is thus presented a case under the authorities, as we read them, for the interposition of a court of equity, and the exercise of its extraordinary equity power.

Judgment reversed and the cause remanded for consideration of the petition."

Miller v. Nut Margarine Co., 284 U. S. 498. Respondent, a manufacturer, brought suit to restrain the Collector from collecting from respondent any tax purporting to be levied under the Oleomargarine Act. Respondent applied for a temporary injunction. The court found that it would suffer irreparable injury unless the Collector was restrained and granted the application. At the trial the court granted a permanent injunction. The Circuit Court of Appeals held R. S. Section 3224 did not apply and affirmed the decree. The Collector seeks reversal upon the grounds that the statute forbids injunction against the collection of the tax even if erroneously assessed. That the assessment was made by the Commissioner under color of his office and was not arbitrary or capricious and that if there is any exception to the application of Section 3224 this case is not within it. The Supreme Court in affirming the decree granting the injunction said:

"Independently of, and in cases arising prior to, the enactment of the provision (Act of March 2, 1867, 14 Stat. 475) which became R. S., Section

3224, this court in harmony with the rule generally followed in courts of equity held that a suit will not lie to restrain the collection of a tax upon the sole ground of its illegality. The principal reason is that, as courts are without authority to apportion or equalize taxes or to make assessments, such suits would enable those liable for taxes in some amount to delay payment or possibly to escape their lawful burden and so to interfere with and thwart the collection of revenues for the support of the government. And this court likewise recognizes the rule that, in cases where complainant shows that in addition to the illegality of an exaction in the guise of a tax there exist special and extraordinary circumstances sufficient to bring the case within some acknowledged head of equity jurisprudence, a suit may be maintained to enjoin the collector. *Dows v. Chicago,* 11 Wall. 108. *Hannewinkle v. Georgetown,* 15 Wall. 547. *State Railroad Tax Cases,* 92 U. S. 575, 614. Section 3224 is declaratory of the principle first mentioned and is to be construed as near as may be in harmony with it and the reasons upon which it rests. *Cumberland Telephone & Telegraph Co. v. Kelly,* 160 Fed. 316, 321. *Baker v. Baker,* 13 Cal. 87, 95. *Bradley v. People,* 8 Colo. 599, 604; 9 Pac. 783; 2 Sutherland, 2d Lewis ed., Sec. 454. The section does not refer specifically to the rule applicable to cases involving exceptional circumstances. The general words employed are not sufficient. and it would require specific language undoubtedly disclosing that purpose, to warrant the inference that Congress intended to abrogate that salutary and well established rule. This court has given effect to Section 3224 in a number of cases. *Snyder v. Marks,* 109 U. S. 189, 191. *Dodge v. Osborn,* 240 U. S. 118, 121. *Dodge v. Brady,* 240 U. S. 122. It has

never held the rule to be absolute, but has repeatedly indicated that extraordinary and exceptional circumstances render its provisions inapplicable. *Hill v. Wallace,* 259 U. S. 44, 62. *Dodge v. Osborn, supra,* 12. *Dodge v. Brady, supra. Cf. Graham v. Du Pont,* 262 U. S. 234, 257. *Brushaber v. Union Pacific R. Co.,* 240 U. S. 1.

This is not a case in which the injunction is sought upon the mere ground of illegality because of error in the amount of the tax. The article is not covered by the Act. A valid oleomargarine tax could by no legal possibility have been assessed against respondent, and therefore the reasons underlying Section 3224 apply, if at all, with little force. *LeRoy v. East Saginaw Ry. Co.,* 18 Mich. 233, 238-239. *Kissinger v. Bean,* Fed. Cas. 7853. . . . It requires no elaboration of the facts found to show that the enforcement of the Act against respondent would be arbitrary and oppressive, would destroy its business, ruin it financially and inflict loss for which it would have no remedy at law. It is clear that, by reason of the special and extraordinary facts and circumstances, Section 3224 does not apply. The lower courts rightly held respondent entitled to the injunction."

In *Shelton v. Gill,* 202 F. 2d 503 (1953), an action was brought to enjoin the collection of an income tax. The lower court denied the injunction and dismissed the complaint. The Circuit Court of Appeals reversed the decision and held that the injunction should have been granted in that the threatened sale of the taxpayer's property would ruin him financially and the taxpayer was not afforded an adequate remedy at law.

Hill v. Wallace, 259 U. S. 44. In this case the Supreme Court said:

> "It has been held by this court in Dodge v. Brady, 240 U. S. 122, 126, that Section 3224 of the revised statutes does not prevent an injunction in a case apparently within its terms in which some extraordinary and entirely exceptional circumstances make its provisions inapplicable. In the case before us a sale of grain for future delivery without paying the tax will subject one to heavy criminal penalties. To pay the heavy tax on each of many daily transactions which occur in the ordinary business of a member of the exchange, and then sue to recover it back would necessitate a multiplicity of suits and indeed would be impracticable. For the board of trade to refuse to apply for designation as a contract market in order to test the validity of the act would stop its 1600 members in a branch of their business most important to themselves and to the country. *We think these exceptional and extraordinary circumstances with respect to the operation of their act make Section 3224 inapplicable.*"

(Supreme Court held the injunction should be granted against the Collector of Internal Revenue.)

Although a court of equity will not restrain the collection of a tax upon the sole ground of its illegality relief will be given where the remedy at law is inadequate.

Miller v. Standard Nut, 284 U. S. 498;
Hill v. Wallace, 259 U. S. 44;
Lee v. Bickell, 292 U. S. 415;
Atlantic v. Daughton, 262 U. S. 413;
Wallace v. Hines, 253 U. S. 66;
Union v. Board, 247 U. S. 282;
Stewart v. Lewis, 287 U. S. 9;

Eisley v. Mohan, 31 Cal. 2d 637, 648;
Wilson v. Illinois Southern Ry., 263 U. S. 574;
Dodge v. Brady, 240 U. S. 122, 126;
Dodge v. Osborn, 240 U. S. 118;
Higgins v. Page, 20 F. 2d 948;
Holland v. Nix, 214 F. 2d 317.

"The general rule in equity, irrespective of statute, is that where, in addition to the illegality of an exaction in the guise of a tax there exist special and extraordinary circumstances sufficient to bring the case within some acknowledged head of equity in jurisprudence, an injunction suit may be maintained. Where such circumstances exist, statutory provisions are rendered inapplicable unless specific language discloses beyond a doubt the purpose to abrogate the salutary and well established rule of equity. *Eisley v. Mohan,* 31 Cal. 2d 649.

"Where there is no adequate remedy at law, the court should have power to grant relief, otherwise the citizen will be more at the mercy of the department of the national government than is consistent with life in a free country." (*Higgins v. Page,* 20 F. 2d 948 (1927).) See also cases collected in 108 A. L. R. 201.

In the within case the plaintiff has alleged in paragraph IX of the amended complaint as follows:

"That many of the plaintiffs would be subjected to oppression and injustice in that they would actually be forced to close down and liquidate their business if defendants insist upon payment of the tax inasmuch as they actually do not have the funds to pay such a tax at this time."

In this case, as in the case of *Miller v. Nut Margarine Co., supra,* the basis for the injunction sought is not a

mere ground of illegality because of error in the amount of the tax but that custom made seat covers are not covered by the statute. In this case, therefore, a valid excise tax, as in the case of *Miller v. Nut Margarine Co., supra,* could by no legal possibility be assessed against the plaintiffs, or any of them.

The allegations (on this appeal held to be true) that many of the trim shop owners will, in fact, be forced to close their businesses if the defendants insist upon immediate payment of the tax [Par. VII of Amended Complaint]; that plaintiffs are not manufacturers and that the tax is a manufacturers tax (Third cause of action); that defendants for over 20 years led plaintiffs to believe, both by letter and by oral assurances, that there was no tax on custom made seat covers, whether for retail customers or new or used car dealers; that many of the plaintiffs would be subjected to oppression and injustice in that they would actually be forced to close down and liquidate their businesses if defendants insist upon payment of the tax, inasmuch as they do not have the funds to pay for such a tax at this time [Par. IX of Amended Complaint]; that none of the plaintiffs have collected any excise tax from their customers for the period for which the defendants are attempting to assess the tax [Par. VIII of Amended Complaint]; are the exceptional and extraordinary circumstances held sufficient in the foregoing cases cited by the plaintiff to grant this Court jurisdiction to issue injunctive relief against the assessment or enforcement of the tax.

On a motion to dismiss the facts properly pleaded must be taken as established. (*Yuba v. Kilkeary,* 206 F. 2d 884.)

III.

Section 3224 of the Revised Statutes Prohibiting Injunctive Action to Restrain Assessment or Collection of a Tax Is Not Applicable Where the Taxing Agent Does Not Have Jurisdiction to Levy the Tax, as Distinguished From Errors or Irregularity or Other Defects Which Are Not Jurisdictional.

Graham v. DuPont, 262 U. S. 234;

Ogden v. Armstrong, 168 U. S. 224;

Varnez v. Warehine, 147 F. 2d 244;

Miller v. Nut Margarine Co., 284 U. S. 510.

In *Graham v. DuPont, supra,* the United States Supreme Court clearly pointed out the distinction as to when an injunction to restrain the collection of a tax would lie. There the Court unequivocally said:

> "The foregoing cases show that Section 3224 is applicable when the injunctive relief prayed for is dependent upon mere errors or irregularities in the assessment which do not go to the foundation of the tax. In such cases it may be properly said that provided the assessment is made on the color of their offices by proper Government officials charged with general jurisdiction of the subject of assessing taxes, the taxpayer is remitted to his legal remedy, if there be one. When, however, it is no mere error or irregularity in the assessment which is complained of, but upon the contrary, a complete want of jurisdiction in the commission to make the assessment and the assessment is in consequence void that Section 3224 is not applicable."

In *Miller v. Nut Margarine Co., supra,* the Court said:

> "A valid oleomargarine tax could by no legal possibility have been assessed against respondent and therefore the reasons underlying Section 3224 apply, if at all, with little force."

In this case the plaintiffs have alleged that the tax which the defendants seek to assess against them is a manufacturers tax and that none of the plaintiffs are manufacturers and that this tax, under no possible consideration, could be held applicable to them.

It therefore follows that in this case the Court has jurisdiction to grant injunctive relief irrespective of the prohibition of Section 3224 of the Revised Statutes.

IV.

The Court Erred in Determining That the Appellant Was Required to First Exhaust Administrative Remedies.

An Action for an Injunction Will Lie to Restrain the Collection of a Tax Even Though the Taxpayer Has Not Exhausted Administrative Remedies.

The Court determined that plaintiff had failed to exhaust the administrative remedies available to it under the Internal Revenue Service prior to the making of the assessments of taxes. Defendants had alleged that only a proposed assessment had been served on plaintiffs and that the administrative procedure provides for a conference within ten days notice of the proposed assessment. Defendants alleged the plaintiff was actually afforded almost 90 days within which to obtain such a conference and refused to avail himself of this right.

In *Shelton v. Gill,* 202 F. 2d 503, the Government, in arguing against an injunction contended that the taxpayer could sue for a refund or could appeal to the Tax Court of Appeals from the Commissioners determination of liability. In answer to these contentions the Circuit Court of Appeals said:

> "It is manifest that the plaintiffs are not afforded an adequate remedy at law through the two alternative methods of judicial review available to them, that is, to permit their properties to be sold and then sue in the courts for recovery, or to appeal to the Tax Court from the Commissioners determination of liability, since the laws consequent upon the interference with their business and a forced sale of their properties would be irreparable."

See also the case of *Eisley v. Mohan,* 31 Cal. 2d 655, where the Supreme Court of the State of California specifically held, in construing a similar statute as Section 3224 of the Revised Statutes, than an action in mandamous to restrain the assessment of a tax was proper rather than to wait for the actual assessment.

In *Higgins v. Page,* 20 F. 2d 948, on a motion to dismiss, the Circuit Court held that it has power to restrain the collection of a tax without the prepayment thereof.

In *Regents v. Page,* 81 F. 2d 577, where a state university denied it was liable for an admission tax, that it was unable to pay the tax and sue for its recovery, the court held it was entitled to maintain a bill to restrain collection of the tax without prepayment of the tax.

In *Mitsukiyo v. Alsup,* 167 F. 2d 104, a petition alleging that plaintiff had signed a form consenting to additional tax assessment upon threat of internment, that no additional tax was due, that he was in no financial position to pay the tax, was held by the court to sufficiently allege the allegations under which the application of the tax may be enjoined.

Midwest v. Brady, 128 F. 2d 496, was an action for an injunction against the tax collector. From the decree dismissing the complaint the plaintiff appealed. The action was brought to enjoin collection of additional taxes under the Social Security Act. Plaintiff alleged the illegality of the tax and that the collection of it would cause it irreparable injury and would destroy its business. That it had no funds to pay the greater portion of the tax. The Circuit Court of Appeals in holding that the Court had jurisdiction to grant the relief prayed for, said:

> "When it is made to appear that the rights and property of an alleged taxpayer will be utterly destroyed if it is compelled to pay a tax that is not in fact his obligation, and the pursuit of his remedy by suit for the recovery will not adequately restore to him that which he has lost, a court of equity may take jurisdiction to grant relief *in advance of payment* notwithstanding the prohibition in Section 3653." (Emphasis supplied.)

To the same effect *Raymond v. Chicago Traction Co.,* 207 U. S. 20, 40.

To the same effect *Wilson v. Illinois Southern Ry.,* 263 U. S. 574, which was a bill in equity to restrain

the collection of taxes on the ground the property was fraudulently over-valued out of all proportion to other taxable property in the state and invoked the jurisdiction of the District Court on the ground that the Fourteenth Amendment of the Constitution was infringed. It further alleges that if the additional amounts demanded could be recovered at all *after payment,* it would be only by multiplicity of suits against the taxing bodies where the collections are made. The defendants made a motion to dismiss for want of equity. The District Court granted the injunction as prayed and the cause was appealed direct to the Supreme Court on the single question whether the plaintiffs had an adequate remedy at law. The United States Supreme Court affirmed the decree and upheld the injunction granted by the court below.

To the same effect *Rickert Rice Mills v. Fontenot,* 297 U. S. 110, where the Supreme Court reversed and remanded the case for the entry of a decree enjoining the collection of the tax.

Allen v. Regents, 304 U. S. 439. In that case the university contended that it should not be required to collect an illegal tax as a condition precedent to contesting its validity and that Section 3224 is not applicable to the suit. In upholding its contention, the Supreme Court said:

> "And if the respondent is right that the statute is invalid as applied to its exhibitions, it ought not to have to incur the expense and burden of collection, return and prosecution of claim for refund of a tax upon others which the state may not lawfully be required to collect."

It Is a General Rule That Available Administrative Remedies Must First Be Exhausted Before a Federal Court Will Grant Injunctive Relief. But the Rule Has Been Held Not Applicable Where It Is Claimed or Clearly Shown That the Administrative Agency Is Proceeding Without Statutory Authority.

Ogden v. Armstrong, 168 U. S. 224, 241;

Vorne v. Warehime, 147 F. 2d 238, 243 (cert. den.), 325 U. S. 882;

Great Northern v. Merchants, 259 U. S. 285;

Wettre v. Hague, 168 F. 2d 825;

Farrell v. Mooman, 85 Fed. Supp. 125;

Group v. Finletter, 108 Fed. Supp. 327;

Polk v. Page, 276 Fed. 128;

Skinner & Eddy v. United States, 249 U. S. 557.

Vorne v. Warehime, 147 F. 2d 238, holding that failure to exhaust administrative remedies generally precludes resort to court but the rule has no application where defect urged goes to jurisdiction of the administrative agency.

Wettre v. Nague, 168 F. 2d 825, held that veterans were not required to exhaust administrative remedies before seeking to vindicate their rights of seniority.

Group v. Finletter, 108 Fed. Supp. 327, where injunction granted although plaintiff had not exhausted his administrative remedies, where it was alleged veterans' rights were being violated.

In *Varney v. Warehime,* 147 F. 2d 238, it is said:

> "If failure to comply with an administrative order subjects one within its terms to a *penalty,* the administrative order is reviewable and does not cease to

be so merely because it is not certain whether proceedings to enforce the penalty incurred for noncompliance will be brought. When regulations affect or determine property rights generally even though not yet directed at any particular person, they may be reviewed by a court in advance of the imposition of sanctions upon a particular person when anticipated conformity to them would cause irreparable injury to the person. . . . Failure to exhaust administrative remedies generally precludes resort to the courts. However, this is not an iron clad rule and it has no application where the defect urged goes to the jurisdiction of the administrative agency. Here it is claimed that the administrative agency had no authority to proceed under the statute. Under such circumstances appellees were not required to resort to the regulations for correction of the errors and irregularities, if any, of the administration before bringing suit."

Ogden v. Armstrong, 168 U. S. 224, 240, holding that where the taxing agency did not have jurisdiction to levy the tax, the taxpayer need not proceed under the statute, and that where the tax was wholly void and illegal the statute and its remedies for errors and irregularities have no application.

Section 3448 of the Internal Revenue Code provides a penalty of 6% from the time when the tax became due until paid; Section 3612 provides for a penalty of 25% of the amount of the tax in case of any failure to make and file a return, in lieu thereof for penalties of 5% for each additional 30 days, not to exceed 25%; Section 2707 provides that any person who fails to pay and pay over the tax shall be liable for an amount equal to the tax not paid; and Section 316.95 provides that any person

who fails to pay any tax due is subject to a fine of $10,000.00, imprisonment, or both.

The failure to file a return or to make immediate payment of a tax assessment subjects the taxpayer to interest and penalties, and under such circumstances a taxpayer is not limited to administrative remedies but may appeal to the courts.

V.

Where the Enforcement of an Illegal Tax Would Lead to a Multiplicity of Suits, a Suit to Restrain the Collection of the Tax Will Lie.

Ogden v. Armstrong, 168 U. S. 224, 237, 238, 240;

Lee v. Bickell, 292 U. S. 415;

Raymond v. Chicago Traction Co., 207 U. S. 20.

In *Lee v. Bickell, supra,* an action was brought to restrain the enforcement of a stamp tax. A District Court of three judges granted an interlocutory injunction which later was made permanent. The State Comptroller appealed. The Florida statute imposed a stamp tax upon all bonds issued in Florida. The failure to pay the tax is declared to be a crime and punishable accordingly. The United States Supreme Court, after reviewing the facts, said:

> "Upon these facts the District Court held that the complainants, who were non-residents of Florida, were without an adequate remedy at law, and that the threatened acts of the Comptroller, if illegal, should be restrained by a court of equity. As to this we are not in doubt, *the multiplicity of actions necessary for redress at law being sufficient without reference to other considerations to uphold the remedy by injunction.* The taxes claimed by the Comptroller

and resisted by the complainants exceed the amount necessary to sustain the Federal jurisdiction. Several hundred transactions are affected every day." (Emphasis supplied.)

(The Supreme Court affirmed the injunction granted by the lower court subject to the proviso that either party to the suit may reapply for a further decree when the Supreme Court of Florida shall have construed the statute).

In *Ogden v. Armstrong* the court said, "Where the tax was wholly void and illegal as in this case the statute and its remedies for errors and irregularities have no application.

A class suit by merchants to enjoin the collection of a tax falls within the spirit and equity of equity. (*Everglader v. Napoleon,* 253 Fed. 246, 252.)

That the complainants and the persons they represent are each severally interested in enjoying the collection of a tax and in different amounts, the theory of the class suit is applicable. (*Jackson v. State Board of Tax Commission,* 38 F. 2d 652.)

In *Gramling v. Maxwell,* 52 F. 2d 256, a suit was brought to enjoin the Commissioner from enforcing against complainant and others similarly situated a tax. Complainant alleged that he filed his suit on behalf of himself and others similarly situated. That there are a number of taxpayers in the same plight and condition as he is. That they have contributed to the expense of the litigation and are directly interested therein. That he and others will suffer irreparable damage unless given relief against the enforcement of the statute as they are unable to pay the tax. That the statute is a violation of

the Constitution and complainant invokes the equity jurisprudence to prevent a multiplicity of suits. The Commissioner filed an answer denying jurisdiction on the ground that the complainant had an adequate remedy at law to pay the tax under protest and sue for its recovery. The court held that this was a class suit not invoking the right of a single taxpayer and that the right to maintain such a suit could not be denied since the adoption of the 38th Equity Rule. (28 U. S. C. A. 723.) The court said:

> "It is well settled for the purpose of avoiding a multiplicity of suits, equity will enjoin the enforcement of a nonconstitutional taxing statute. The only question is whether the prevention of such multiplicty as would result from membership of a class paying an unconstitutional tax and bringing suits for recovery thereof comes within the rule and justifies the awarding of an injunction in a suit brought in behalf of the members of the class. We think that it does."

In Pomeroy's Equity Jurisprudence (5th Ed., Vol. 1, pp. 529-534), it is said:

> "In a large number of the states the rule has been settled in well-considered and often-repeated adjudications by courts of the highest character for ability and learning, that a suit in equity will be sustained when brought by any number of taxpayers joined as co-plaintiffs, or by one or more plaintiffs suing on behalf of all taxpayers similarly situated, or sometimes even by a single taxpayer suing on his own account, to enjoin the enforcement and collection, and to set aside and annul, any and every kind of tax or assessment laid by governmental authorities, either for general or special purposes, whether it be entirely

personal in its nature and liability, or whether it be made a lien on the property of each taxpayer, whenever such tax is illegal. . . . In the face of every sort of objection urged against a judicial interference with the governmental and executive function of taxation, these courts have uniformly held that the legal remedy of the individual taxpayer against an illegal tax, either by action for damages, or perhaps by certiorari, was wholly inadequate; and that to restrict him to such imperfect remedy would, in most instances, be a substantial denial of justice, which conclusion is, in my opinion, unquestionably true. The courts have therefore sustained these equitable suits, and have granted the relief, and have uniformly placed their decision upon the inherent jurisdiction of equity to interfere for the prevention of a multiplicity of suits. The result has demonstrated the fact that complete and final relief may be given to an entire community by means of one judicial decree, which would otherwise require an indefinite amount of separate litigation by individuals even if it were attainable by any means."

It is also to be noted that Mr. Pomeroy (at p. 675) declares that:

> "If recognized equitable grounds for exercising jurisdiction appear, the federal courts, in the exercise of their equity jurisdiction, are not bound by state statutes which forbid the issuance of injunctions to prevent the collection of taxes."

To the same effect, see note, 108 American Law Reports, page 218.

VI.

Section 3403 of the Internal Revenue Code Limits the Excise Tax to Articles Sold by the Manufacturer.

Defendants maintain that the sale of seat covers to a dealer in new or used automobiles is subject to the tax because such a sale is not a sale for consumption but one for resale. In S. T. 944, a ruling issued by the defendants, it was stated that the Internal Revenue Service had reconsidered its position and now concluded that the sale of seat covers by the manufacturer would be taxable on custom made to order seat covers, but the ruling went on to state that because of the past rulings concerning the non-application of the tax to automobile seat covers which are produced for the consumer, the new ruling issued on August 18, 1952, would not be applied retroactively with respect to sales of seat covers prior to August 18, 1952.

There is nothing in the statute to justify this interpretation. Section 3403 of the Internal Revenue Code reads as follows:

> "There shall be imposed upon the following articles sold by the manufacturer, producer or importer a tax equivalent to the following percentages of the price for which so sold. Parts or accessories * * * (for automobiles)."

The defendants have considered seat covers to be parts or accessories within the meaning of Section 3403(c) of the Internal Revenue Code. There is no other language in Section 3403 which would enable an interpretation to be made that it was the intendment to subject seat covers

made for dealers to the excise tax while exempting sales made to consumers. As set forth in the original affidavit on file in this case, for 20 years the Collector of Internal Revenue has on innumerable occasions informed various trim shops and other persons that custom made to order seat covers, whether made for retail consumers or dealers, was not subject to excise tax.

In the case of *Johnnie & Mack, Inc. v. The United States of America,* case No. 5024-M, June 16, 1954, District Court of the United States for the Southern District of Florida, an action was commenced by the plaintiffs who were the operators of a trim shop, to recover from the Collector of Internal Revenue an assessment made against them for excise taxes on seat covers on sales made to dealers. It was the contention of the United States in that case, that sales made to dealers, even though on custom made to order seat covers, was subject to tax. The Court held that this distinction was an unwarranted distinction and granted judgment in favor of the trim shop for the recovery of the excise tax paid. This decision has become final and no appeal has been perfected therefrom by the United States.

That attached to the affidavit of William H. Martin is a copy of a letter sent to the National Association of Auto Trim Shops, signed by R. J. Bopp, whose designation is Chief, Excise Tax Branch, in which, Mr. Bopp, referring to the above cited case, said:

> "We agree with the court's conclusion of law that the distinction drawn between sales of seat covers

made to order of individual automobile owners and new or used car dealers is an unwarranted distinction."

Section 3403(c) of the Internal Revenue Code refers to a tax on sales made by the manufacturer. Plaintiffs in this case are not manufacturers. They are no more manufacturers than are tailor shops manufacturers, and there is therefore no basis for the ruling of August 18, 1952, that custom made seat covers are subject to excise tax. Nor have the defendants in this case pointed out any logical basis why the excise tax on sales made to dealers should be applied retroactively whereas such sales previously made by them to retail customers should not be applied retroactively.

In *United States v. Meriam,* 263 U. S. 188, the Court said:

> "If the words are doubtful the doubt must be resolved against the government and in favor of the taxpayer."

In *Miller v. Nut Margarine Co.,* 284 U. S. 262, it is said:

> "It is elementary that tax laws are to be interpreted liberally in favor of taxpayers and that words defining things to be taxed may not be extended beyond their clear import. Doubts must be resolved against the government and in favor of taxpayers."

United States v. Alabama R. R. Co., 142 U. S. 615, 621:

> "It is a settled doctrine of this court that in case of ambiguity the judicial department will lean in favor

of a construction given to a statute by the department charged with the execution of such statute, and, if such construction be acted upon for a number of years, will look with disfavor upon any sudden change, whereby parties who have contracted with the government upon the faith of such construction may be prejudiced. It is especially objectionable that a construction of a statute favorable to the individual citizen should be changed in such manner as to become retroactive, and to require from him the repayment of monies to which he had supposed himself entitled, and upon the expectation of which he had made his contracts with the government."

VII.

The Collector of Internal Revenue May Be Barred by Estoppel or Waiver From Assessing a Tax.

Smale v. Robinson, Inc., U. S. District Court, Southern District of California, Case No. 14531. Opinion of Judge William Mathes;

Stockstrom v. Commission, 190 F. 2d 283;

Lindsey v. Hawes, 67 U. S. 554;

United States v. Jones, 176 F. 2d 278;

Miller v. Nut Margarine Co., 284 U. S. 498;

Walker v. United States, 139 Fed. 409;

Branch v. United States, 98 Fed. Supp. 757;

Farrell v. County of Placer, 23 Cal. 2d 624, 627;

48 Harvard Law Review, 1299.

VIII.

A Change in Governmental Usage Cannot Be Made Retroactive.

In *Walker v. United States,* 139 Fed. 409, cited with approval *United States v. McDaniel,* 8 L. Ed. 587, the Court said:

> "Usages have been established in every department of the Government which have become a kind of common law and regulate the rights and duties of those who act within their respective limits, and no change of such usages can have a retrospective effect but must be limited to the future."

It is respectfully submitted that the judgment dismissing the action and denying appellant a preliminary injunction should be reversed.

Respectfully submitted,

PHILL SILVER,

Attorney for Appellant.